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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KAELIN MARQUISE KING, Defendant and Appellant.	C084634 (Super. Ct. No. 15F07168)

At gunpoint, defendant Kaelin Marquise King robbed the victim of a tablet and was later arrested nearby in possession of the tablet and a handgun. A jury found defendant guilty of second degree robbery (Pen. Code, § 211)[1] and found true the allegation he personally used a firearm during the commission of the robbery (§ 12022.53, subd. (b)). The trial court sentenced defendant to an aggregate term of 12 years in prison.

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[1] Undesignated statutory references are to the Penal Code in effect at the time of the charged offenses.

On appeal, defendant contends: (1) the evidence was insufficient to support the robbery conviction; (2) because he did not testify, the trial court prejudicially erred in instructing the jury with CALCRIM No. 361, failure to explain or deny adverse testimony; (3) the judgment must be reversed because cumulative error deprived him of his due process right to a fair trial; and (4) the matter must be remanded to the trial court so that it can exercise its discretion as to whether to strike the firearm enhancement based on the change to section 12022.53 that took effect on January 1, 2018.

We remand the matter to the trial court to consider whether to strike or dismiss the firearm enhancement in the interests of justice pursuant to section 1385. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution's Case

The Victim's Testimony

On Thanksgiving morning, November 27, 2015, the victim was playing a game on his Samsung 4 tablet as he was walking on Empress Street near Calvados Avenue in Sacramento. A man, later identified as defendant, asked the victim if he wanted to buy some methamphetamine. When the victim said no, defendant asked if he wanted to buy some marijuana. After the victim declined, defendant walked across the street toward him. When defendant was about five feet away from the victim, defendant pulled out a gun, pointed it at the victim, and demanded the tablet. The victim immediately gave the tablet to defendant. Defendant then walked back across the street and stood in front of the apartments where he had been standing before he approached the victim. The victim walked away and called 911 about 10 minutes later, after he found someone he knew with a cell phone.

The 911 call was placed at 10:42 a.m. The recording of the call was played for the jury. During the call, the victim explained that approximately five to 10 minutes earlier, he was walking on Empress Street near Calvados Avenue when a man approached him,

pulled out a gun, and took his iPad. He later clarified that the man took his "Samsung." The victim described the suspect as a thin, five foot nine "black guy" with short red-tipped dreadlocks. He said the suspect was "about in his twenties" and was wearing dark clothing; specifically, a dark or dark blue checkered jacket and black pants. He explained that the perpetrator had walked away to a nearby apartment complex on Empress Street. The victim described the suspect's gun as small and said it looked like a .22-caliber handgun. Before hanging up, the victim agreed to wait for the police at his location.

When an officer arrived at the victim's location around five minutes later, he drove the victim toward the location of the robbery. From a distance of approximately 32 feet, the victim identified defendant, who was already in custody. The victim explained that he initially could not determine whether defendant was the perpetrator because the sun was in his eyes. However, after the officer repositioned the patrol car, he identified defendant as the person who had robbed him. Shortly thereafter, the victim was shown a tablet, which he confirmed belonged to him.

Officer Ryan Cleveringa's Testimony

Around 10:47 a.m. on November 27, 2015, Officer Ryan Cleveringa of the Sacramento Police Department was dispatched to a reported robbery on Empress Street and Calvados Avenue. He was informed that the suspect was armed with a small .22-caliber gun, had taken an iPad, and had gone to an apartment complex on the west side of Empress Street. The suspect was described as a thin, five foot nine black male in his 20's with short red-tipped braids. He was wearing black pants and a black jacket.

As Cleveringa was driving on Empress Street near Calvados Avenue, he noticed a man, later identified as defendant, standing in front of an apartment complex at 2319 Empress Street. According to Cleveringa, defendant matched all the "physical descriptors" (height, build, hair, age) of the suspect as well as most of the "clothing descriptors." Cleveringa noted that defendant was wearing a dark jacket but was wearing

white, not black, pants. The jacket was a black windbreaker that did not have a checkered pattern.

Cleveringa detained defendant and searched his person. During the search, a tablet was found under defendant's shirt tucked in his front waistband. A black, loaded .22-caliber semiautomatic pistol was found inside the right front pocket of his pants.

When asked, defendant said that he stayed at one of the apartments with his "baby mama." At the time defendant was contacted, he was with his girlfriend, Passion Robinson.

Following the search, the victim was brought to the location for showup. Officer Cleveringa took defendant from the back of his patrol car and placed him in plain view. According to Officer Cleveringa, he provided a clear, unobstructed view of defendant.

When defendant was booked into custody, it was determined that he was 18 years old, five feet 10 inches tall, and weighed approximately 160 pounds.

Officer Tobias Williams's Testimony

Around 10:40 a.m. on November 27, 2015, Officer Tobias Williams of the Sacramento Police Department was dispatched to the victim's location. Upon his arrival, the victim told Officer Williams that he had just been robbed. When Officer Williams learned that a suspect had been detained, he drove the victim to defendant's location to confirm whether or not he was the perpetrator.

Prior to arriving at defendant's location, Officer Williams gave the victim the standard admonishment for a showup, including the admonition that the person detained may or may not be the person who committed the crime, there was no obligation to identify the detained person as the person who committed the crime, and, just because the

person was in handcuffs, does not mean that the person committed the crime.[2] When the patrol car was approximately 50 to 70 feet away from defendant, the victim identified him as the perpetrator. At the time the victim made the identification, defendant was standing outside a patrol car. The victim told Officer Williams that he was absolutely positive in his identification.

When asked, Officer Williams explained that the victim was initially unable to determine whether defendant was the perpetrator because the sun was in his eyes. However, the victim identified defendant as the person who robbed him after the patrol car was repositioned.

On cross-examination, portions of a video recording from Officer Williams's in-car camera were played for the jury. During the recording, the victim said, "That's the mother fucker," while defendant was seated inside a patrol car. However, after defendant got out of the patrol car, the victim said, "That ain't him." When Officer Williams asked, "That's not him?" the victim said, "I can't see from back here, man." After Officer Williams repositioned his patrol car so the sun was no longer affecting the victim's vision, the victim said, "That's him." When asked if he was sure, the victim said, "Yeah that's him." The video recording shows that the victim was approximately 20 feet away from defendant when he identified him. However, there is no identification admonition in the recording.

At trial, it was stipulated that a search of an apartment at 2319 Empress Street revealed an unloaded black BB gun. Officer Williams testified that he took that gun to the victim's location and had a brief conversation with him about it. Officer Williams

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[2] According to the victim, he was only asked whether he could identify the perpetrator and not given any admonition. He was also told to make sure he was positive that the suspect was the perpetrator.

was not certain whether the victim identified the BB gun as the gun used in the robbery. The victim had not been shown any other guns.

Defense Case

The Victim's Testimony on Recall

When the victim was called as a witness during the defense case, he testified that he told Officer Williams that the BB gun was the gun used in the robbery.[3] On cross-examination, the victim was shown a picture of the black BB gun and the black gun found in defendant's pocket on the date of the robbery. When asked, the victim stated that the guns looked "pretty similar" to him. The victim explained that Officer Williams only showed him one gun on the date of the robbery, and that his identification of the gun was based on the fact that it was small and black.

Passion Robinson King's Testimony

At the time of trial, Passion Robinson King was defendant's wife. In November 2015, she had been defendant's girlfriend. King testified that, on the date defendant was arrested, an African-American man approached them and asked if they wanted to buy a tablet. She described the man as being in his early 20's and "medium tall" with shoulder length red-tipped dreads. According to King, the man walked away after defendant gave him $50 for the tablet. King testified that prior to defendant's arrest, she had been with him all morning and he had not left her presence.

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[3] During the prosecution's case, the victim was shown the handgun Cleveringa had seized from defendant. The victim testified that, because of the lapse of time, he was not sure if that was the gun defendant had used, though it was approximately the same shape and there was nothing different about it.

At the close of evidence, the parties stipulated that "the gun presented to [the victim] by Officer Williams was the BB gun that's Exhibit 11A in this case when he drove to his location and showed the weapon to him."

On cross-examination, King testified that she told the police she had been with defendant all morning, and when they asked if she was with him at the time of the robbery, she responded that she was too overwhelmed, did not know what was going on and did not want to talk about it. She also acknowledged that after defendant was arrested, she never gave a statement to the police.

Verdict and Sentencing

The jury found defendant guilty of robbery in the second degree (§ 211) and found the section 12022.53, subdivision (b), firearm enhancement true. The trial court sentenced defendant to an aggregate term of 12 years in prison, calculated as follows: the low term of two years for the robbery and 10 years for the firearm enhancement.

DISCUSSION

I. Sufficiency of the Evidence

A. Defendant's Contention

Defendant contends the evidence was insufficient to support the robbery conviction. We disagree.

B. Standard of Review

" 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We reverse for lack of substantial evidence only if " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

C. Analysis

Viewing the record in the light most favorable to the judgment, we conclude there was substantial evidence to support the robbery conviction. The victim testified that his Samsung 4 tablet was taken from him at gunpoint while he was walking on Empress Street near Calvados Avenue. Around 10 minutes later, he called 911 and reported the robbery. During the call, he provided a description of the perpetrator and explained that the gun was small and looked like a .22-caliber handgun. The victim also provided the location of the robbery and noted that the perpetrator had walked to a nearby apartment complex on Empress Street. When Officer Cleveringa responded to the location of the robbery, he observed a man, later identified as defendant, standing in front of an apartment complex on Empress Street near Calvados Avenue. Defendant matched the description of the perpetrator with the exception of his clothing; he was wearing white, not black pants, and his black jacket did not have a checkered pattern. A search of defendant revealed a small, loaded .22-caliber handgun in his pocket and a Samsung tablet under his shirt, tucked into his waistband. In a showup, just minutes after the robbery, the victim identified defendant as the person who had robbed him. The victim also confirmed that the tablet found in defendant's possession belonged to him. At trial, the victim again identified defendant as the person who had robbed him.

Under these circumstances, there was sufficient evidence from which a jury could have reasonably concluded that defendant was guilty of robbery.

II. Instructional Error

A. Defendant's Contention

Defendant contends the trial court prejudicially erred by instructing the jury with CALCRIM No. 361, failure to explain or deny adverse testimony. The People concede the instructional error, but argue the error was harmless. We agree with the People.

B. Additional Background

After defendant exercised his right not to testify at trial, the trial court and counsel discussed jury instructions. During the discussion, the court expressly stated, "we don't have 361. We'll take that one out." However, for some reason not disclosed in the record, the trial court instructed the jury orally with CALCRIM No. 361. That instruction applies *when a defendant testifies* and reads: "If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." The written copy of the instructions provided to the jury also included CALCRIM No. 361. Surprisingly, neither the prosecutor nor defense counsel objected to the instruction when the judge gave the instruction orally or to the instruction packet given to the jury for their deliberations.

C. Analysis

The People properly concede that the trial court erred in instructing the jury with CALCRIM No. 361 since defendant did not testify. (See *People v. Cortez* (2016) 63 Cal.4th 101, 117-118; *People v. Mask* (1986) 188 Cal.App.3d 450, 455 [discussing CALJIC No. 2.62, the predecessor to CALCRIM No. 361].)

We evaluate the prejudicial effect of such error under the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). Although it is error to

give an instruction which correctly states a principle of law but has no application to the facts of the case, if that is the only error, it does not implicate federal constitutional rights. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130; see *People v. Saddler* (1979) 24 Cal.3d 671, 683 [applying *Watson* standard to an instructional error based on CALJIC No. 2.62, the predecessor to CALCRIM No. 361 in a case where the defendant testified].)

In applying the *Watson* standard, we must determine whether it is reasonably probable that the result would have been more favorable to defendant had the error not occurred. (*Watson, supra,* 46 Cal.2d at p. 836.) Under *Watson,* the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. (*People v. Guiton, supra,* 4 Cal.4th at p. 1130.) "[T]he *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' " (*People v. Beltran* (2013) 56 Cal.4th 935, 956 (*Beltran*).) On this record, we find the instructional error harmless.

We look first to the other instructions the court provided to the jury. Most important here is CALCRIM No. 355. That instruction addresses the rule to be applied *when a defendant does not testify*. It reads: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way." Additionally, the court instructed the jury with CALCRIM No. 200. In pertinent part, that instruction

reads: "Some of these instructions may not apply, depending on your findings about the facts of the case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

The first sentence of CALCRIM No. 361 begins with, "*If the defendant failed in his testimony* to explain or deny evidence against him . . . ," thus making it clear that that instruction applies only if the defendant testifies, as opposed to CALCRIM No. 355, which applies when the defendant does not testify. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) There were no communications from the jury indicating any confusion relative to CALCRIM No. 361. Thus, based on the instructions given, we may presume the jury disregarded CALCRIM No. 361, because it did not apply here.

Next looking to the prosecutor's closing argument, we note that no mention was made of defendant failing to explain or deny the evidence against him. Thus, nothing the prosecutor said highlighted or compounded the error.

And finally, the evidence of defendant's guilt was strong. Defendant was found near the location of the robbery shortly after the robbery took place in possession of the tablet taken from the victim. The jury was properly instructed on this important circumstance with CALCRIM No. 376. That instruction reads: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact recently been stolen, you may not convict the defendant of [r]obbery based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed the [r]obbery. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of [r]obbery. [¶] Remember that you may not convict the defendant of any crime unless you are convinced

that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

Moreover, it was reasonable for the jury to reject the testimony of defendant's wife, who had an obvious bias (Evid. Code, § 780, CALCRIM No. 226), because when she had the chance, she failed to tell the arresting officer that defendant had just purchased the tablet, give the police the description of the person who allegedly sold it to defendant, provide information about the location where the sale took place and any other information that could have led the officers to that person and exonerated defendant. Instead, after asking why defendant was going to jail, she apparently stood by while defendant was arrested and taken away to jail on Thanksgiving. And thereafter, she never reported to the police how defendant purportedly came into possession of the tablet. Instead, the first time she gave a statement about the purchase of the tablet was when she testified, a year and five months after the fact.

In addition to the tablet, defendant also had in his possession a small, .22-caliber handgun. The victim had reported that the person who robbed him used a small .22-caliber handgun.

Defendant highlights minor differences in the victim's description of the robber and defendant's actual description. For example, he notes the victim told the officers that the robber had short, red-tipped dreadlocks and defendant's red-tipped dreadlocks came down to his shoulder. Setting aside for the moment whether shoulder length dreadlocks might be considered by some people to be short, defendant's wife testified that the man who purportedly sold defendant the tablet had shoulder length red-tipped dreadlocks, like defendant.

Defendant points to a discrepancy between the victim's testimony and the officer who took him to the location of the showup about whether the victim was given the customary admonition before being shown the suspect. The victim said he was not given the admonition and the officers testified that he was, although the in car video showed

that one of the officers did not give the admonition on the way to the showup. This discrepancy is inconsequential in light of the other evidence.

Defendant highlights the fact that the clothing defendant was wearing when he was arrested did not match the description of the clothing the victim reported the robber was wearing and that defendant was wearing jewelry when arrested and the victim reported no jewelry. But as defendant acknowledges, the robbery took place only a block from the apartment where his wife's family resided. And defendant told Cleveringa that he had been staying at one of the apartments with his "baby mama." He was detained in the parking lot of the apartment building. A reasonable jury could have concluded that there was sufficient time between the time of the robbery and the time defendant was contacted by the police to change clothes and put on his jewelry.

Under the circumstances presented here, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (See *Beltran, supra*, 56 Cal.4th at p. 956; *Watson, supra*, 46 Cal.2d at p. 836.) Accordingly, we conclude that the instructional error was harmless.

III. Cumulative Error

Defendant contends that the cumulative effect of the "errors" deprived him of his due process right to a fair trial. In support of this argument, he asserts: "Here insufficient evidence to convict [defendant] beyond a reasonable doubt was bolstered by a jury instruction that advised the jury it could consider [defendant's] failure to explain or deny the People's evidence when it was determining guilt. In combination, these errors are damning on the People's case. [Defendant] deserves a reversal of his conviction." We disagree.

Because there was more than sufficient evidence to support the robbery conviction and the instructional error was harmless, defendant's cumulative error claim fails. (See *People v. Panah* (2005) 35 Cal.4th 395, 501 [cumulative effect of rejected claims of error and errors found to be individually harmless does not require reversal of the judgment].)

IV. Senate Bill No. 620

A. Defendant's Contention

Defendant contends that, under a recent amendment to section 12022.53, this matter must be remanded to the trial court so it may consider whether to strike the firearm enhancement imposed in this case.

The People agree that defendant is entitled to the benefit of the recent change to the law because the amendment provides discretion to impose a lesser sentence, and because there is nothing in the amendment to suggest the Legislature intended it to apply prospectively only. However, the People argue that remand would be futile because the record shows that the trial court would not have stricken the firearm enhancement had it known it had the discretion to do so.

We agree with defendant.

B. Analysis

On October 11, 2017, the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended section 12022.53, subdivision (h), effective January 1, 2018 (Stats. 2017, ch. 682, § 2). Prior to the enactment of Senate Bill No. 620, and at the time defendant was sentenced by the trial court, section 12022.53 required mandatory imposition of sentencing enhancements. As amended, this provision now states: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

For the reasons stated by this court in *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 (*Woods*), we conclude that the recent amendment to section 12022.53 is retroactive and applies to this case. We further conclude that the matter must be remanded to the trial court to provide it the opportunity to exercise its discretion to strike the firearm enhancement in the first instance. We are not persuaded by the People's

contention that remand is not required in the instant case because such a remand would be futile. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*) [remand not required where trial court's comments at sentencing and sentence itself show that "no purpose" would be served by a remand].) In support of this contention, the People argue that defendant was on probation at the time of the robbery, he committed numerous burglaries as a juvenile, and his criminal conduct was increasing in seriousness.

More recently, various cases have set forth a clear test to be employed when determining whether to remand in circumstances such as those presented here. Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Gutierrez is an example of a case where the trial court gave a clear indication that it would not have exercised its discretion in a way favorable to the defendant. In *Gutierrez*, the appellate court concluded that it need not remand the case for the trial court to exercise its discretion under *Romero*[4] to strike a prior conviction under the "Three Strikes" law, because the record showed that the trial court would not have exercised such discretion. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) At sentencing in that case, the trial court "stated that imposing the maximum sentence was appropriate" and that the defendant was " 'the kind of individual the law was intended to keep off the street as long as possible.' " (*Ibid.*) The trial court increased the defendant's sentence "beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements."

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[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

(*Ibid*.) On these facts, the *Gutierrez* court concluded that the trial court would not exercise its discretion to lessen the sentence, and therefore "no purpose would be served in remanding for reconsideration." (*Ibid*.)

Here, the trial court imposed the low term of two years for the robbery, plus the mandatory 10 years for the firearm enhancement. In selecting the low term for the robbery, the court noted that while defendant had "many theft convictions and . . . suffered many juvenile convictions," he had never served a term in prison and was very young. In contrast to *Gutierrez*, the court gave no indication whether it would have exercised its discretion to lessen the length of defendant's sentence if it had the discretion to do so. Indeed, the court imposed the low term and thus demonstrated a willingness to show some leniency.

Accordingly, we will remand the matter for the trial court to consider whether to exercise its discretion under sections 12022.53, subdivision (h) and 1385. We note that in resentencing defendant, the trial court is not bound to the low term sentence it originally imposed. It is entitled to reconsider other sentencing choices, subject only to the limitation that defendant not be sentenced to a greater aggregate term than originally imposed. Thus, in the exercise of its discretion, it could choose another term from the robbery triad if it strikes or dismisses the firearm use allegation. (See *People v. Castaneda* (1999) 75 Cal.App.4th 611; *People v. Savala* (1983) 147 Cal.App.3d 63, 66-70.)

DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike or dismiss the firearm enhancement under sections 12022.53, subdivision (h) and 1385 and resentence defendant if it decides to do so. In all other respects, the judgment is affirmed.

/s/
MURRAY, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
DUARTE, J.